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**IN THE
COURT OF APPEALS OF INDIANA**

RICKY R. SLUSHER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0606-PC-277

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George Biddlecome, Judge
Cause No. 20D03-0505-PC-11

April 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Ricky Slusher was convicted following a jury trial of child molesting, a Class C felony. He initiated a direct appeal of that conviction, but ultimately moved for and was granted remand to the trial court to pursue post-conviction relief. On appeal from the subsequent denial of post-conviction relief, Slusher contends that the post-conviction court erred in finding that his trial counsel provided effective assistance and in excluding certain medical records regarding the victim that he offered into evidence at the post-conviction hearing. Concluding that Slusher's counsel did not render ineffective assistance and that Slusher's substantial rights were not affected by the post-conviction court's exclusion of the evidence, we affirm.

Facts and Procedural History

On March 25, 2003, the State charged Ricky Slusher with Class C felony child molesting for allegedly molesting T.W., his stepdaughter, in June 2002. Slusher's girlfriend, Rhonda, arranged for Slusher to meet with attorney Arvil Howe in June 2003 because she was unhappy with Slusher's then-current counsel.¹ Howe met with Slusher and Rhonda for over an hour to discuss the molestation case. Slusher's mother, Datha Bice, participated in the meeting via telephone. Slusher alleges that during this meeting Howe described the process he would follow in representing Slusher, such as interviewing witnesses, subpoenaing witnesses, and taking depositions. Howe was hired to represent Slusher at this first meeting. Howe received the State's discovery, including police reports and a written

¹ Slusher and T.W.'s mother, Andrea, divorced following the molestation allegations.

report summarizing the statement T.W. gave to Gayla Konanz, a forensic interviewer with the Child and Family Advocacy Center.

Howe denies that he told the Slushers in the first meeting that he would take depositions in the case. The trial strategy utilized by Howe was not to depose the State's witnesses. Howe testified at the post-conviction hearing that he believes depositions are generally not helpful. Specifically, with regard to T.W. as the complaining witness, Howe testified that deposing her would have provided her with a dress rehearsal for her testimony and allowed her to reiterate that testimony, given the State information regarding the defense trial strategy, and provided the State with testimony given under oath to use if the witness froze on the stand or otherwise was unwilling or unable to testify at trial.

Slusher alleges that a meeting took place a few days before the trial, but Howe is unable to recall this meeting. During the alleged meeting, Howe discussed his responsibilities at trial and his strategy to call Slusher as a witness and cross-examine T.W. and her mother, Andrea.

The defense strategy hinged on the fact that Slusher touched T.W.'s chest because she had asthma and Slusher was trying to break up the congestion. Howe did not obtain T.W.'s medical records with regard to her asthma because he did not think there was any dispute as to whether she had asthma. Andrea testified that T.W. was not diagnosed with asthma until after this incident. T.W., however, did admit on cross-examination that she had asthma at the time that Slusher was still living with them. In addition, Howe called Bice to testify regarding a visit to Slusher and Andrea's home prior to the molestation during which she

observed that Andrea took T.W. to the doctor, returned saying, “[T.W.’s] got what I got,” trial tr. at 162, and picked up a prescription for T.W.

T.W. testified that her aunt called her on the telephone to find out if T.W. was telling the truth because T.W. had told her aunt prior to this incident that she did not like Slusher. Also, Konanz interviewed T.W., prepared a written report of the interview, and made a videotape. The report stated that T.W.’s aunt called T.W. and asked her several times if she was lying because T.W. does not like Slusher. Howe stated that this statement alone was not relevant, so Howe did not pursue the matter. Howe also testified that although he could have called Konanz to testify, everything she would have said would be hearsay.

T.W.’s brother, B.S., who is the biological son of Slusher and Andrea, was present in the room before the molestation, and Howe wanted to speak with B.S., but Slusher did not want B.S. to testify because “they thought he would be a little bit flighty or scared or whatever, confused; so they didn’t want him to testify.” PCR Tr. at 69. Bice confirmed Slusher’s desire not to have B.S. testify.

During trial, Howe gave an opening statement, cross-examined witnesses, called witnesses, and made a closing argument. Howe also made objections, one of which prevented T.W.’s babysitter from repeating the substance of what T.W. told her regarding the molestation. Another objection by Howe prevented the prosecutor from eliciting evidence regarding pornographic material on Slusher’s computer. Howe did not tender any proposed jury instructions.

The jury found Slusher guilty as charged. The trial court imposed a six-year sentence.

Slusher retained Howe to represent him on appeal, but after Howe requested and received several extensions of time, Slusher hired Douglas Grimes to complete his appeal. In his brief on direct appeal, Slusher challenged the sufficiency of the evidence, made six to ten allegations of ineffective assistance of trial counsel, and raised a due process challenge to the rule precluding the inclusion of extra-record material in the appendix. Then Slusher filed a motion asking for a remand to the trial court so that he could pursue an immediate post-conviction petition to create a record to support his ineffective assistance claims. This court granted Slusher's motion and remanded to the trial court to hold a Davis/Hatton hearing.² Slusher v. State, 823 N.E.2d 1219, 1224 (Ind. Ct. App. 2005).

On remand, Slusher filed a petition for post-conviction relief alleging fifteen claims of ineffective assistance of counsel: 1) failure to conduct pre-trial discovery; 2) failure to investigate T.W.'s alleged prior inconsistent statements; 3) failure to take a deposition of T.W. or any other witness; 4) failure to interview B.S.; 5) failure to prepare Slusher to testify; 6) failure to make relevancy objections; 7) failure to file pre-trial motions; 8) failure to move for a mistrial with respect to testimony about Slusher's computer usage; 9) failure to tender instructions on intent or anything else; 10) failure to object to the final instructions; 11) failure to get a continuance regarding the unserved subpoenas; 12) failure to interview potential witnesses; 13) failure to review the videotape of T.W.'s statement; 14) failure to make relevant motions at the close of the evidence and the trial; and 15) failure to call

² The Davis /Hatton procedure involves the suspension or termination of a direct appeal that has already been initiated to allow a more thorough record to be compiled through post-conviction proceedings.

character witnesses at sentencing. Following an evidentiary hearing, the post-conviction court denied relief.

Slusher now appeals the denial of post-conviction relief for ineffective assistance of trial counsel. Slusher raises the following arguments: Slusher's counsel was ineffective for failing to conduct pre-trial discovery by not taking depositions or obtaining medical records, failing to pursue evidence in the interview report that T.W. did not like Slusher, failing to tender instructions on intent and prior inconsistent statements, and failing to interview B.S.³ He also alleges the post-conviction court should have admitted T.W.'s medical records pertaining to asthma into evidence at the post-conviction hearing.

Discussion and Decision

I. Post-Conviction Standard of Review

Post-conviction proceedings are not “super appeals” through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. Rather, they afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Bahm v. State, 789 N.E.2d 50, 57 (Ind. Ct. App. 2003), aff'd on reh'g, 794 N.E.2d 444, trans. denied. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. McCarty, 802 N.E.2d at 962. When a petitioner appeals the denial of post-conviction relief, he appeals from a

³See Hatton v. State, 626 N.E.2d 442, 443 (Ind. 1993); Davis v. State, 267 Ind. 152, 156-57, 368 N.E.2d 1149, 1151 (1977).

negative judgment; consequently, we may not reverse the post-conviction court's judgment unless the petitioner demonstrates the evidence, as a whole, leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Id. We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not have to give deference to the post-conviction court's conclusions of law. Id. On appeal, we do not reweigh the evidence or reassess the credibility of the witnesses. Id.

II. Ineffective Assistance of Counsel

We analyze claims of ineffective assistance of trial counsel according to the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984). Law v. State, 797 N.E.2d 1157, 1161 (Ind. Ct. App. 2003). First, we require the petitioner to show that, in light of all the circumstances, the identified acts or omissions of counsel were outside the wide range of professionally competent assistance. Id. This showing is made by demonstrating that counsel's performance was unreasonable under prevailing professional norms. Id. Second, we require the petitioner to show adverse prejudice as a result of the deficient performance, that is, that but for counsel's deficient performance, the result of the proceedings would have been different. Id. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. Id. at 1161-62.

The petitioner must demonstrate both deficient performance and resulting prejudice. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000), cert. denied, 534 U.S. 830 (2001).

³ Slusher does not pursue on appeal any of the other issues raised on direct appeal; nor does he pursue

Deficient performance is that which falls below an objective standard of reasonableness. Id. Counsel's performance is presumed effective, and a petitioner must offer strong and convincing evidence to overcome this presumption. Id. Prejudice exists when "there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation." Id. (quoting Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996)). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

B. Trial Counsel's Alleged Errors

"The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead v. State, 845 N.E.2d 1027, 1036 (Ind. 2006). Slusher advances four instances in which he believes his trial counsel was ineffective.

First, Slusher contends trial counsel failed to adequately conduct pre-trial discovery by not taking depositions or obtaining medical records. Howe testified to a strategic reason for deciding not to take the depositions of T.W. or Andrea. Howe's strategy was centered on his belief that depositions are generally not helpful because they provide the witness with a dress rehearsal for testimony, give the State information regarding the defense strategy, and provide the State with sworn testimony to use if the witness is unavailable at trial. Even the

all allegations of ineffective assistance of counsel raised in his petition for post-conviction relief.

best criminal defense attorneys may disagree with respect to strategy. See McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002). Howe cited valid reasons for not taking depositions, and we do not critique counsel's strategy or tactics.

The other part of Slusher's claim that counsel failed to conduct pre-trial discovery focuses on Howe failing to obtain medical records for T.W.'s asthma. Howe was under the impression that T.W.'s condition was common knowledge. It may have been prudent of Howe to obtain medical records since T.W.'s asthmatic condition was such a large focus of the defense's strategy, but T.W. did ultimately testify that she had asthma while she and Slusher lived in the same house. Further, Bice testified that she observed Andrea buy prescriptions for T.W.'s asthma prior to this incident. Moreover, T.W. testified that Slusher kissed her neck, stomach and lips and reached under her pants and underpants to touch her vagina. Even if defense counsel had taken depositions and obtained T.W.'s medical records, Slusher has failed to demonstrate how the result of his trial would have been any different because evidence of T.W.'s asthma was placed before the jury and there were allegations against Slusher to which her asthma was not a defense. Counsel's performance regarding pre-trial discovery was not ineffective.

Second, Slusher contends that trial counsel was ineffective for failing to pursue evidence that T.W. did not like Slusher in order to attack T.W.'s credibility. Trial counsel received and read the report from Konanz, the forensic interviewer, which mentioned T.W.'s aunt calling and asking whether T.W. was lying. Howe gave two legitimate reasons for not introducing this report. First, the report contained detrimental allegations against Slusher.

Second, the specific line in the report regarding T.W.'s aunt calling T.W. to ask if she was lying would be inadmissible as hearsay. Indiana Evidence Rule 801 defines hearsay as an out-of-court oral or written statement offered to prove the truth of the matter asserted. Also, Indiana Evidence Rule 704(b), which the State mentions in its brief, would also apply and as such, counsel could not call the aunt as a witness to testify regarding whether T.W. liked Slusher because "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully, or legal conclusions."

Trial strategy is not subject to attack through an ineffective assistance of counsel claim unless the strategy is so deficient or unreasonable as to fall outside of an objective standard of reasonableness. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). Counsel's strategy was centered on Slusher and T.W. having a close stepfather/stepdaughter relationship and T.W.'s misinterpretation of innocent touches. Evidence regarding T.W.'s dislike for Slusher would have been contrary to trial counsel's overall strategy. Therefore counsel's performance was not ineffective for failing to pursue evidence of T.W.'s dislike for Slusher.

Third, Slusher argues that trial counsel was ineffective for failing to tender instructions on intent and prior inconsistent statements. Counsel reviewed the court's instructions and did not tender any additional proposed instructions based on his belief that the trial court's instructions were sufficient. The trial court's instructions advised the jury that it must find that the touching was committed with the intent to arouse or satisfy a person's sexual desires. This would cover the intent instruction that Slusher argues should

have been given. Similarly, the jury was advised of its role as the judge of witness credibility, and there was no evidence that T.W. had actually made prior inconsistent statements to support the giving of an instruction focused on such statements. In addition, Slusher has failed to show this court that he was prejudiced by the trial court's instructions.

Finally, Slusher argues that counsel's failure to interview B.S. or call him as a witness amounted to ineffective assistance. But, this decision was made after Slusher himself informed counsel that B.S. would not make a good witness on his behalf. Slusher said that B.S. allegedly lies and might testify against Slusher. Slusher is not allowed to prevent counsel from interviewing B.S. and affirmatively state that B.S. would not be a good witness, only to argue after conviction that his counsel was ineffective for not interviewing B.S. Furthermore, Slusher must show that he was prejudiced by counsel not talking to B.S. or calling him as a witness. At the post-conviction hearing, Slusher chose not to call B.S. as a witness, so there is no way to determine what evidence might have been gained by B.S.'s testimony. See Badelle v. State, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001), trans. denied (deciding in relevant part that, when trial counsel's efforts were "more than adequate" to support a defense of mistaken identity, counsel's decision not to call or seek out additional witnesses was a judgment call within the wide range of reasonable assistance).

In sum, counsel's efforts and strategies, although they did not ultimately achieve the result desired by Slusher, were not so unreasonable as to constitute ineffective assistance of counsel. Although Slusher alleged many errors, counsel was able to provide explanations for his decisions. In addition, there were differences in recollections of what counsel promised

and what Slusher and his family wanted. We do not reweigh evidence or judge the credibility of witnesses. See McCarty, 802 N.E.2d at 962. Slusher did not prove a different outcome would have occurred but for trial counsel's alleged errors, and as a result, we cannot say the post-conviction court erred in denying Slusher's petition for post-conviction relief.

III. Exclusion of Evidence

Slusher contends the post-conviction court erred in refusing to admit into evidence at the post-conviction hearing two exhibits offered by Slusher. The trial court has broad discretion in ruling on the admissibility of evidence, and we will reverse a trial court's ruling only for an abuse of that discretion. Truax v. State, 856 N.E.2d 116, 124 (Ind. Ct. App. 2006). An abuse of discretion is established when a decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

The exhibits Slusher offered were T.W.'s medical records from an asthma and allergy center, dated May 16, 2002, prior to the incident of molestation. The State objected on the grounds of privilege and confidentiality. Slusher briefly cites to the statute regarding physician privilege, and claims that Andrea, on behalf of T.W., waived T.W.'s physician/patient privilege by testifying regarding T.W.'s asthmatic condition, and therefore, T.W.'s asthma center records should have been admitted into evidence.

Assuming without deciding that the post-conviction court erred in considering the medical records to be privileged and excluding them from evidence, we hold that the error was harmless. An "error involving an abuse of discretion does not require reversal unless it affects the substantial rights of a party or is inconsistent with substantial justice." Ross v.

State, 835 N.E.2d 1090, 1092 (Ind. Ct. App. 2005), trans. denied; Ind. Trial Rule 61. Slusher sought to have the medical records entered into evidence to further support his argument that his counsel was ineffective for failing to conduct pre-trial discovery and further develop Slusher's defense that he touched T.W. in the course of relieving an asthma attack. The question of T.W.'s asthmatic condition was not in doubt once T.W. acknowledged during cross-examination at Slusher's trial that she had asthma at the time of the incident. As a result, the fact Slusher was seeking to prove via allegedly privileged records was established from the trial record and there was no need to admit the records at the post-conviction stage. Slusher's substantial rights were not affected by excluding the medical records from the post-conviction hearing.

Conclusion

Slusher alleged many errors by his trial counsel, but counsel provided reasonable explanations for his trial decisions, and Slusher did not prove the requisite prejudice. We therefore conclude the post-conviction court did not err in determining that Slusher's counsel did not render ineffective assistance. Also, we conclude that, at most, the post-conviction court's exclusion of the medical evidence Slusher sought to have admitted during the post-conviction hearing was harmless error.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.